RASHID HUSSAIN SECURITIES SDN BHD

v.

CHEN THEN SONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D5-22-386-1999]
8 FEBRUARY 2001

SECURITIES: *Shares - Sale and purchase of - By direct deal agreement - Whether rules and regulations of the Kuala Lumpur Stock Exchange applicable - Whether parties had contravened any trading rules*

CONTRACT: *Breach - Shares - Sale and purchase of - Direct deal - Failure of third defendant to make payment to plaintiff - Delivery of shares before or after payment - Whether an issue - Whether plaintiff entitled to hold on to shares until payment - Whether justified under s. 52 Contracts Act 1950 - Whether there exists a collateral promise between the plaintiff and third defendant - Whether plaintiff entitled to sue - Whether third defendant liable*

CONTRACT: *Breach - Application for summary judgment - Whether triable issues raised - Whether allowed - Rules of the High Court 1980, O. 14*

The plaintiff is a company dealing in securities and is a member of the Kuala Lumpur Stock Exchange (KLSE). The first and second defendants had instructed the plaintiff to sell the shares on their behalf to the third defendant on a direct deal basis. Pursuant to the instructions given, and upon an agreement to purchase by the third defendant, the plaintiff sold the shares to the third defendant and proceeded to pay the first and second defendants the net sales proceeds. In breach of the direct deal agreement, the third defendant failed, refused and neglected to pay a certain amount of sum to the plaintiff.

The plaintiff's claim in this O. 14 application for summary judgment and its claim against the third defendant for the sum of RM16,736,500 was dismissed by the registrar. Hence, this appeal. The issues that arose were: (i) whether the settlement terms contravened the KLSE regulations; (ii) whether the plaintiff must deliver the shares before the payment; and (iii) whether the plaintiff can sue as an agent of a disclosed principal.

Held:

[1] The sale and purchase of shares in this case was by direct deal, (or by what is known in the industry as a married deal) whereby the shares were purchased directly from the sellers without going through the KLSE. As a matter of common sense therefore, the early settlement rule and regulation pertaining to the sales and purchases agreement through the KLSE would not apply. It was clear that the parties had not contravened any trading rules or regulations in force at the time of transaction.

[2] Whether the shares must first be delivered before or after payment was a non-issue. It was purely a question of convenience in the performance of the parties' obligation in the contract. It was not a term of the contract and it did not matter whether the merchandise was delivered before or after payment or at the time when payment was made. Furthermore, the plaintiff's entitlement to hold on to the shares until the third defendant paid the purchase price could be justified under s. 52 of the Contracts Act 1950.

[3] The promise by the third defendant to the plaintiff to buy over and pay to the plaintiff the purchase price of the shares that the plaintiff had paid to the first and second defendants had constituted a contract between the plaintiff and the 3rd defendant collateral to whatever agency position that the plaintiff may have assumed between the parties. Thus, the existence of that collateral promise entitled the plaintiff to sue the third defendant in its own right.

[4] In undertaking an assessment of whether summary judgment should be entered against the third defendant in this case, it was appropriate to adopt the pro-active attitude in *Bank Negara Malaysia v. Mohd Ismail.* The plaintiff's appeal against the registrar's decision disallowing summary judgment was allowed.

[5] The 3rd defendant's liability in this application could not have been more conclusive. It had failed in its obligation to pay the shares it had agreed to purchase from the 1st and 2nd defendants through the plaintiff. The grounds that it put forth to oppose this application were purely technical in nature. Far from showing that it had a fairly arguable case to answer, they exposed a sly attempt on its part to escape its contractual responsibility.

[Appeal allowed with costs.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 ***(refd)***

Montgomerie v. United Kingdom Steamship Association [1891] 1 QB 370 ***(refd)***

RHB-Cathay Securities Pte Ltd v. Ibrahim Khan & Other Actions [1999] 3 SLR 464 ***(refd)***

Southwell v. Bowditch [1876] 1 CPD 374 ***(refd)***

Theresa Chong v. Kin Khoon & Co [1976] 2 MLJ 253 ***(refd)***

UMBC Securities Sdn Bhd v. Tan Chee Aan [2001] 6 CLJ 341 ***(refd)***

YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 52, 183
Rules of the High Court 1980, O. 14
Securities Industries Act 1983, s. 84

For the plaintiff - Leong Wai Hong; M/s Skrine
For the defendant - Balvinder Singh Kenth; M/s Sri Ram & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

The plaintiff is a company dealing in securities and is a member of the Kuala Lumpur Stock Exchange (KLSE). Its claim in this O. 14 application for summary judgment is fairly straightforward.

The supporting affidavit of its General Manager, Ng Yoke Mun discloses as follows:

> 3. On or about 30.12.1997, the 1st and 2nd Defendants, Chen Then Song and Garth Kevin Albuquerque, instructed the Plaintiff to sell the shares as stated in paragraph 4 below on their behalf to the 3rd Defendant on a direct deal basis and to pay the net proceeds of the sale of the Shares to the 1st and 2nd Defendants respectively.
>
> 4. Pursuant to the above instructions and upon an agreement to purchase by the 3rd Defendant, the Plaintiff sold the following shares to the 3rd Defendant (hereinafter referred to as "the Shares"). Particulars of the contracts for sale and purchase of the Shares are as follows:

(1) with regards to the 1st Defendant's instructions:-

Date	Contract Note	Counter	No. of Shares	Gross Proceeds (RM)
30.12.1997	S-7A1544601	Uniphoenix Corporation Berhad ("UCB")	1,550.000	14,492.500.00

(2) with regards to the 2nd Defendant's instructions:-

Date	Contract Note	Counter	No. of Shares	Gross Proceeds (RM)
30.12.1997	S-7A1545001	UCB	240,000	2,244,000.000

Now produced and shown to me are copies of the following marked as exhibits:-

"P-1" – the Contract Notes issued by the Plaintiff to the 1st and 2nd Defendant for the Contracts.

"P-2" – letter dated 30.12.1997 from the Plaintiff to the 3rd Defendant confirming the sale of the Shares.

"P-3" – letter from the 3rd Defendant to the Plaintiff dated 31.12.1997 confirming the purchase of the Shares.

5. Upon the sale of the Shares to the 3rd Defendant and upon the instructions of the 1st and 2nd Defendants, the Plaintiff proceeded to pay the net sales proceeds of RM14,399,294.50 and RM2,224.286.00 to the 1st and 2nd Defendants respectively.

6. In breach of the direct deal agreement, the 3rd Defendant failed, refused and/or neglected to pay the sum of RM16,736.500.00 or any part thereof to the Plaintiff, despite repeated demands by the Plaintiff. Now produced and shown to me collectively marked as Exhibit "P-4" are copies of the Plaintiff's letters to the 3rd Defendant dated 26.1.1998 and the 3rd Defendant's holding Company, Omega Holdings Bhd. dated 26.1.1998 and 6.1.1998.

7. By the aforesaid letter dated 26.1.1998 exhibited as "P-4", the plaintiff had also advised the 3rd Defendant that interest would be charged on the outstanding sums due. I respectively say that the Plaintiff is entitled to interest on the outstanding sums as follows:

(a) interest of 14.75% per annum up from 24.1.1998 to 31.1.1998 and at the rate of 18.0% per annum from 1.2.1998 to 30.6.1998, amounting to RM1,196,774.37;

(b) thereafter, interest at the rate of 18% per annum from 1.7.1998 to 31.10.1998;

(c) thereafter interest at the rate of 16.25% per annum from 1.11.1998 to 30.6.1999;

(d) and further interest of 13% per annum from 1.7.1999 to the date of full settlement.

8. By 2 letters dated 31.7.1998, the Plaintiff's solicitors, Messrs. Skrine & Co. wrote to the 3rd Defendant, demanding the outstanding sums due to the Plaintiff together with interest thereon. Now produced and shown to me marked as Exhibit "P-5" are copies of Messrs. Skrine & Co.'s letters dated 31.7.1998 to the 3rd Defendant.

9. I verily believe that according to the records and documents of the Plaintiff the debt was incurred and is still due and owing as aforesaid.

10. I verily believe that there is no defence to this action.

The plaintiff's claim against the 3rd defendant in this application is for the sum of RM16,736,500 as at 30 June 1998, being requisite payment for the defendant's shares and interests as stated in para. 7 of the supporting affidavit.

The registrar upon hearing the parties had dismissed the plaintiff's application. Hence this appeal.

The 3rd defendant's counsel Mr. Balvinder Singh was able to see the issues in this case in the correct perspective. Rather than going all out to forestall summary judgment on some flimsy arguments likely or unlikely as some counsel might have resorted to, he had readily identified only three points the deliberation of any one of which, he submitted, would raise a triable issue.

The First Point – Whether The Settlement Terms Contravene The KLSE Regulations

This issue was raised in para. 3.2 of the 3rd defendant's affidavit which read as follows:

I refer to Exhibit "P2" annexed to the plaintiff 1st Affidavit and state that the settlement terms stated therein are in contravention of the Kuala Lumpur Stock Exchange Regulations;

The averment being unspecific and devoid of particulars does not deserve any consideration and should have been dismissed. But in his submission, Mr. Balvinder pointed to the express statement in the confirmation of purchase letter (exh. P2 in the plaintiff's affidavit) which stated clearly that payment for the purchase was to be 26 days after the day of transaction.

He submitted that since the parties had subjected themselves to trade under the KLSE trading rules (as the endorsement at the bottom of the contract notes in exh. P1 of the plaintiff's affidavit would show), a failure to follow the regulation (which he did not specify) which required the settlement to be made by a certain earlier date, would render the transaction unenforceable.

It is now common knowledge sufficient for this court to take judicial notice, that ordinarily, the sale and purchase of shares of public listed companies are transacted through the KLSE by its member companies at the price quoted at the exchange. The function of the plaintiff (as a member company of the KLSE) in such a case, would be to act either for the buyer or the seller to buy or to sell in accordance with the trading rules of the KLSE. It is also of common knowledge that in such a case, the parties would usually bind themselves to transact under the trading rules and regulations of the KLSE with respect to the days within which the defendant would have to pay up and take delivery of the shares purchased failing which the plaintiff would be forced to sell them. Mr. Balvinder's submission would be quite viable had the shares been bought for the 3rd defendant through the KLSE.

But the sales and purchase of shares in the instant case was by direct deal, (or by what is known in the industry as a married deal) whereby the shares were purchased directly from the sellers without going through the KLSE. As a matter of common sense therefore, the early settlement rule and regulation pertaining to the sales and purchases through the KLSE would not apply in this case.

It would appear that in respect of purchase by direct deal no specific settlement period seemed to be prescribed by the KLSE as otherwise Mr. Balvinder would have brought it to my notice. On the other hand counsel for the plaintiff Mr. Leong was able to point to r. 14(1)(a) of the Trading by Member Companies of the KLSE which in the absence of any objection from Mr. Balvinder, I must accept as correct and accurate. The rule, he submitted pertained to the sales and purchase of shares by direct deal as it existed just before 1 September 1998 and would apply in the instant case.

The rule it would appear allowed such a sale subject only to the requirement of sub-r. 1(b) thereunder. A direct deal (or a marriage deal) was described as "direct business" under the rule. Rule 14 read (as it subscribed immediately before 1 September 1998):

Rule 14(1)

(a) Direct business means any business transacted outside the "Automated Trading system" and shall include:

(i) crossings; that is transactions between two Member companies; or

(ii) "married" transactions between two clients within a Member company; or

(iii) any other transactions as determined by the Committee from time to time.

(b) All direct business must be reported in accordance with regulations and procedures as prescribed by the Committee from time to time.

The parties, it is clear had not contravened any trading rules or regulations in force at the time of transaction. There is therefore no merit in Mr. Balvinder's submission on this issue.

But even assuming that the parties had contravened the trading rules and regulations of the KLSE in failing to adhere to its rigid rule of requiring the purchaser to pay for the shares purchased within the specified period, the contract is still perfectly legal and enforceable.

A sale and purchase transacted directly between a seller and a buyer in the eyes of the law is no less valid than a sale transacted through the KLSE. From the legal standpoint, a contract is essentially a bargain with commercial elements between consenting parties. Provided that all the elements required to form a contract are present and provided it does not belong to that class which offends against public policy or is prohibited by statute, the parties are entitled to assume that it would be enforced by the court.

It is clear that such direct sales and purchase of shares brokered by the plaintiff in this case could not have been anywhere near to offending any aspect of public policy recognised in law. Neither is there any statutory prohibition of such a transaction. The Securities Industry Act 1983 in particular, which regulates the KLSE, contains no injunction against such a sale.

The parties were quite free to ignore or to modify whatever trading rules and regulations that the KLSE may prescribed for its members and to decide to enter into contracts upon their own terms and conditions. On its part the plaintiff may incur the wrath of the KLSE, but that is entirely a different matter for the plaintiff to settle with the. KLSE. The rules and regulations of the KLSE were meant to bind only members of the KLSE and not persons with whom its members contracted with. The law on this point had been settled by the Federal Court in *Theresa Chong v. Kin Khoon & Co.* [1976] 2 MLJ 253, a case involving a serious breach of the rules and regulations of the KLSE in which share transactions had been executed through an unregistered remisier. It was held that such a contract was perfectly enforceable (per Gill CJ, Ali and H.S. Ong concurring):

> Not being registered as a remisier is not contrary to public policy because the bye-laws of the Stock Exchange are the bye-laws of a private body which have no force of law. They are binding on the plaintiffs but not on the defendants. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of bye-law 97 of the Stock Exchange Rules which provides for a penalty. But their dealing with such a remisier did not make such a contract illegal as being opposed to public policy.

The principle in *Theresa Chong* is of high authority and well established. It appears to have been followed in *YK Fung Securities Sdn. Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300, a case which involved transactions contravening s. 84 of the Securities Industries Act 1983 relating to false trading and market rigging, where the Court of Appeal secured to have implied that the contract could not be invalidated.

The principle was carried across the causeway in *RHB-Cathay Securities Pte. Ltd v. Ibrahim Khan and Other Actions* [1999] 3 SLR 464 at 478 wherein it was held by the Singapore High Court that share dealing transactions conducted in breach of the plaintiff's obligation under the Singapore Stock Exchange (SES) Rules and Bye-Laws to exercise proper supervision over its dealer would not render them void or illegal on ground of public policy. Following *Theresa Chong*, it held that the breach had only exposed the plaintiff in that case to being penalised by the SES.

The same sentiment was shared by the High Court in *UMBC Securities Sdn. Bhd. v. Tan Chee Aan* [2001] 6 CLJ 341. There the same innovative argument was raised with respect to the failure on the part of the plaintiff to force sell the shares on the eight day following the day of transaction contrary to the trading rules and regulations of the KLSE then in force. It was held that the failure of the plaintiff to sell it immediately on that day did not render the contract unenforceable.

The Second Point – The Plaintiff Must Deliver The Shares Before Payment

This submission centers on the averment (in para. 4.2 of the 3rd defendant's second affidavit in reply) that it is the normal practice in the industry that payments for shares purchased by **one broker from another** need only be made after the shares were delivered to the other. Mr Balvinder submitted that since the plaintiff had not challenged or deny this averment, it must therefore be deemed to have admitted it as correct. The plaintiff not having delivered the shares to the defendant, so it was argued, was not therefore bound to pay for them.

The submission is misconceived and unsustainable.

Firstly, the averment was a bare statement unsupported by any evidence of such a practice. The plaintiff would not be worst off if it chooses not to reply to such an empty statement.

Secondly, even if some evidence of such a practice could be advanced, it may not be applicable in the context of the present case. The contract for the sales and purchase of the shares was conducted on a tripartite basis – between the plaintiff, the 1st and 2nd defendants and the 3rd defendant. In satisfaction of its obligation the plaintiff had already paid out the purchase price of RM16,623,580.50 to the 1st and 2nd defendants. All that remains now is for the 3rd defendant to fulfil its obligation of paying for the shares that it had purchased.

Thirdly, whether the shares must first be delivered before or after payment is a non issue. It is purely a question of convenience in the performance of the parties' obligation in the contract. It is not a term of the contract and it does not matter whether the merchandise is delivered before or after payment or at the time when payment is made.

A perusal of the letter of demand from the solicitors of the plaintiff (exh. P5) disclosed beyond any doubt that the 3rd defendant had failed to pay for the shares which the plaintiff had purchased from the 1st and 2nd defendants. On the contrary, there is nothing on record to show that the 3rd defendant had ever requested that the shares be delivered to it for the payments to be made. The plaintiff was entitled to hold on to the shares until the 3rd defendant pay the purchase price to the plaintiff together with the requisite commissions.

The position taken by the plaintiff in not delivering the shares until the 3rd defendant pays for them can be readily justified under s. 52 of the Contracts Act 1950 which reads as follows:

> **Promisor not bound to perform unless reciprocal promisee ready and willing to perform.**
>
> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustration (a) of s. 52 made the plaintiff's position all the more certain:

> A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods unless B is ready and willing to pay for the goods on delivery.

There is no factual or legal question that ought to go for trial on this issue.

The Third Point – Whether The Plaintiff Can Sue As An Agent Of A Disclosed Principal

Finally, it was contended that the plaintiff being the disclosed agent of the 1st and 2nd defendants in the sales of the shares cannot sue the 3rd defendant. That right, it was contended, vests only on the 1st and 2nd defendants.

This aspect of the law of agency in contract is expressed in the first paragraph of s. 183 of the Contracts Act 1950 which reads as follows:

> 183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

The general rule that an agent for a disclosed principal possess neither rights nor liabilities with regard to third parties, stems from the simple logic of attributing the act of the agent to his principal, as Wright, J in *Montgomerie v. United Kingdom Steamship Association* [1891] 1 QB 370 said at 371:

> The contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal.

The rule is far from inflexible as the words "in the absence of any contract to that effect," in s. 183 clearly provides. It may be excluded by the implied or express intention of the contracting parties and it is purely a

question of construction in each case whether the agent is liable and to what extent he is liable which led Wright, J to say further at 372 of the same judgment:

> Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue, either concurrently with or to the exclusion of the principal.

In the oft cited case of *Southwell v. Bowditch* [1876] 1 CPD 374 a broker issued a contract note couched in these terms – 'Messrs Southwell, I have this day sold by your order to my principals, etc. 1 per cent brokerage. Signed W.A. Bowditch.'

Subjecting the contract to construction, nevertheless, Jessel, M.R. found that the broker was not personally liable for the goods sold, despite the absence of words in the contract note to show that the defendant had signed the contract in his own name without any additional words to show that he had signed in the capacity of an agent. Per Jessel M.R.:

> There is nothing whatever on the contract to show that the defendant intended to act otherwise than as broker. No doubt it does not absolutely follow from the defendant appearing on the contract to be a broker that he is not liable as principal. There are two ways in which he might be made liable: first, intention on the face of the contract making the agent liable as well as the principal; secondly, usage.

To determine whether the plaintiff in the instant application could sue the 3rd defendant one must turn to consider the nature of the contract that the parties had entered into in the instant case.

The plaintiff's function, it is clear, was merely to act as a conduit for the sales and purchase of the shares from the 1st and 2nd defendants to the 3rd defendant at the price which had been pre-determined by the defendants. That transaction requires the plaintiff first to buy over with their own money the shares from the 1st and 2nd defendants. They would then be sold to the 3rd defendant. One can therefore readily read into the transaction the existence of a promise by the 3rd defendant to the plaintiff to buy over and pay to the plaintiff the purchase price of the shares that the plaintiff had paid to the 1st and 2nd defendants. That promise constitutes a contract between the plaintiff and the 3rd defendant collateral to whatever agency position that the plaintiff may have assumed between the parties.

The existence of that collateral promise entitles the plaintiff to sue the 3rd defendant in its own right. The plaintiff having bought and paid for the shares, the 3rd defendant is now obliged to buy over those shares from the plaintiff by paying the plaintiff the sums that it had paid to the 1st and 2nd defendants together with the requisite commissions.

Conclusion

A failure on the part of the decider to explore the plaintiff's case sufficiently will deprive it of the expeditious judgment that it justly deserves under the Rules of the High Court.

In undertaking an assessment of whether summary judgment should be entered against the 3rd defendant in this case, it may be appropriate to adopt the pro-active attitude of Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627 wherein His Lordship said at p. 631 that:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand.' (See *Cow v. Casey and European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508.)

The 3rd defendant's liability in this application could not have been more conclusive. It had failed in its obligation to pay for the shares it had agreed to purchase from the 1st and 2nd defendants through the plaintiff. The grounds that it put forth to oppose this application were purely technical in nature. Far from showing that it has a fairly arguable case to answer, they expose a sly attempt on its part to escape its contractual responsibility. It belies an attempt on its part to delay for as long as it could, the payment which it should have settled way back in 1998.

The plaintiff's right to be paid for the sums it had paid to the 1st and 2nd defendants, the commission that it has earned and the interests for the late payments has by this application been established. To deny the plaintiff the judgment it sought would tantamount to ignoring, what Hashim Yeop Sani SCJ, in *Malayan Insurance (M) Sdn. Bhd v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246, said at p. 249:

The underlying philosophy of O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Decision

The appeal against the registrar's decision disallowing summary judgment is allowed with costs. There shall be an order in terms of the plaintiff's application.